Supreme Court, U. S.
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No. 80-1127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

C-F AIR FREIGHT, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether Draconian measures regularly imposed by the National Labor Relations Board ("Board"), adopted by certain Courts of Appeals but rejected by others, are sanctioned by the decision in *NLRB* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969) and whether this Court mandated that an employer who has been found guilty, on exiguous evidence, of a threat to close a facility must continue to operate a failing enterprise which, in addition, has been subjected to violent and illegal strikes by a union demanding recognition without a Board directed election.

2. Whether an employer who is found to have unlawfully threatened to terminate operations is foreclosed from subcontracting, irrespective of the nature of adverse economic circumstances which dictated the decision to subcontract.

3. Whether the Board and the Court of Appeals for the Second Circuit ("Court") have translated the standard of "substantial evidence" enunciated in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) into a rubber stamp to be applied, no matter how tenuous the alleged rational basis for the decision by an administrative agency.

Parties to the Proceeding

Petitioner

C-F Air Freight, Inc.

Respondent

National Labor Relations Board

Parent

Consolidated Freightways, Inc.
(Delaware)

Affiliates

Centron Ltd. (Bermuda)

CF Data Services, Inc. (Delaware)

Consolidated Freightways Corporation of Delaware (Delaware)

Consolidated Metco., Inc. (Delaware)

Freightliner Corporation (Delaware)

Freightliner Credit Corporation (Delaware)

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of Jurisdiction

On September 30, 1980 the Court of Appeals for the Second Circuit ordered that an order of the National Labor Relations Board which held that Petitioner violated §§8(a) (1) and 8(a) (3) of the National Labor Relations Act, as amended, 29 U. S. C. §158 (7a-8a) be enforced (1a-4a).*

* The docket at the office of the Clerk of the Court of Appeals shows that on October 15, 1980 a mandate issued (judgement and statement of costs) but a copy was not served upon Petitioner nor upon Respondent and one is not in the files of the Clerk. Hence, only the order and decision of September 17, 1980 is reproduced as Appendix A (1a-4a). The Clerk advised that the September 17, 1980 decision was to be deemed a final judgement.

A timely petition for rehearing, filed with Court of Appeals, was denied on November 7, 1980 (5a-6a).

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Statute Involved

The following statute which is involved in this case is set forth in Appendix C infra:

National Labor Relations Act, as amended [61 Stat. 136, 73 Stat. 519, 88 Stat. 295, 29 USC §151 *et seq.*]

Section 8(a)(1) [29 U.S.C. §158(a)(1)]

Section 8(a)(3) [29 U.S.C. §158(a)(3)]

Statement of the Case

Petitioner, a domestic and international air freight forwarder, maintained a terminal at John F. Kennedy Airport ("JFK") for the receipt and delivery of airborne shipments from and to the New York Metropolitan Area. Additionally, Petitioner operates out of thirty-six terminals and at some of them, union personnel is employed (A. 272-273).[1]

Prior to June 1977, Petitioner employed at JFK a small clerical and sales staff who were not represented by any labor union (A. 179).

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[1] The reference to "A" followed by a number is to the Record on Appeal filed with the Court of Appeals, followed by the page number. References to the Appendices are indicated by a number followed by a small letter. A copy of the Record will be lodged with the Clerk of this Court.

On February 23, 1977, long before there was any union activity, the Petitioner's Board of Directors determined to shut down the JFK terminal unless the serious losses incurred there were arrested (A. 284-285; 290, 318-319; 322-324, 388). It was conceded by the General Counsel and the Board, that the JFK facility had sustained aggregate losses of approximately $900,000 between 1974 and 1977. (A. 3, A. 367-387, Exhibits "7" and "8"). In an effort to arrest the losses, Petitioner appointed David Condon ("Condon") as a division manager with jurisdiction over the JFK terminal (A. 3; 177, 212).

On March 15, 1977, when Condon was advised that the employees were interested in joining a union (A. 6; 179, 207), he called a meeting, attended by all clerical and sales personnel (A. 6; 63-64, 130, 155, 210) to "find out what the major complaints were" (A. 6; 315). The Board's witnesses testified that Condon said he knew that the employees were seeking information about a union and that there had been "obvious communications problems for which [he] held [himself] at fault" (A. 7; 211, 64, 118, 142). He then assured them that: "he was trying to make a go of it at JFK", that their jobs were safe (A. 7, 64, 97, 142-143, 156, 167, 329); he planned to improve the terminal's financial status (A. 7; 65, 119, 120, 129, 212); there "was no need for a union"; and the Petitioner would close the terminal if a union came in (A. 7; 156, 64, 98, 119, 143, 146).[2] Condon then requested the employees to give him more time to "turn the terminal around" (A. 7; 64, 119, 143) and "in the event that [he was] successful, that they would be successful because . . . increased sales . . . means the jobs would grow, there would be additional

[2] This testimony was disputed, but Petitioner is not challenging credibility findings at this time.

jobs, there would be promotions within the terminal" (A. 7; 212-213, 120-121, 166, 171). Condon concluded by announcing that if his plans did not work out and the employees still wanted a union, he would "drive [them] down to the Union hall" (A. 7; 156-157, 131). Despite Condon's efforts, the Petitioner continued to sustain losses but no employees were dismissed.

Shortly prior to June 11, 1977, the clerical employees, led by a supervisor Edward Ryby ("Ryby") met with one Michael Hunt ("Hunt"), President of Local 851 IBT ("Union") (A. 67) an arm or affiliate of Local 295 IBT (A. 100) and told him that the employees were thinking of joining the Union (A. 33-34). On June 12, 1977, Petitioner's employees appeared at the Union's office, signed authorization cards (A. 35-36; 69-72; 122) and decided to strike (A. 36-37; 52-53). Hunt then sent a telegram to Condon demanding immediate recognition of the Union (A. 37; 351).

On June 13, 1977 at 6:45 A.M., without notice to the Petitioner, Ryby and the clerical employees arrived at the JFK facility and began to picket (A. 38). Hunt again demanded immediate recognition of the Union and the execution of a so-called "standard" labor contract without any negotiation by Petitioner (A. 53) Condon replied that he did not have the authority to sign a contract or to deliver a letter of recognition, but he promised to call Petitioner's main office for instructions (A. 39; 73). Hunt would brook no delay: his response was a campaign of violence (A. 355-358) conducted by the Union and Local 295. The assaults on persons and damages to property were enjoined by the Supreme Court of the State of New York, Queens County (A. 355-358). Petitioner then filed charges with Region 29 of the Board, against the Union and Local 295. A complaint was duly issued by the Board (A. 340) which charged the unions, *inter alia,* with inflicting bodily injury

and other harm to employees of Respondent and third parties. After investigation, the Union entered into an informal settlement agreement with the Board and agreed not to inflict bodily harm on employees of Petitioner and to cease engaging in a secondary boycott. On July 5, 1978, the Board entered a decision and order (A. 359-363) in which it directed Local 295 to cease its secondary boycott activities, one object of which, the Board stated, was to force or require Petitioner to recognize or sign a collective bargaining agreement with the Union.

It is noteworthy that until July 5, 1978, Petitioner had not been charged with any unfair labor practices. On the contrary, it was the victim of grievous unfair labor practices, violence and mayhem which seriously disrupted its business.

On July 10, 1977, the Union sent a telegram to Petitioner unconditionally offering, on behalf of the employees, to return to work the following day (A. 353). Condon replied on July 11, 1977, stating that it would take time to reinstate normal operations at the JFK terminal but promised to communicate with each of the employees and to offer employment as jobs became available and full operations resumed (A. 353).[3]

On July 11, 1977, the employees and Ryby appeared with Hunt at the JFK facility. No one was working at that time, and the terminal was closed. Thereupon the employees led by Hunt, filed a charge with Region 2 of this Board alleging an unlawful lockout by Petitioner and

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[3] Even where an unfair labor practice strike is terminated by an offer to return to work, the Board recognizes that the employer is entitled to a reasonable time to resume operations.

asserted that by that conduct and "other acts", Petitioner violated the Act (A. 366).

Three days later, Condon offered reinstatement to two of the employees and they returned to work for two weeks, but walked off the job and rejoined the picket line at the Union's request (A. 9). Once again, the Union shut down the JFK facility.

On August 18, 1977, the Regional Director of Region 29 of the Board dismissed the charges that had been filed by the Union on July 11, 1977 (A. 364-366) finding, *inter alia,* that the employees had not been locked-out because of their Union activities. He ruled that "the investigation did not establish that the Company violated the Act in any other manner encompassed" by the charge (A. 364-365). Clearly, then the Regional Director determined that the Petitioner was not motivated by any anti-union animus.

Faced with the continued shutdown of its JFK operation, the persistent demand that all strikers be immediately reinstated, even if there was no work for them (as a direct consequence of the Union's unlawful conduct, enjoined by a State court), employee participation in the Union's unfair labor practices, previously condemned by the Board, and knowing that unless it was able to immediately employ all the strikers (which it had stated it could not do because of the start-up problems), it could look forward to continual harassment, work interruptions and loss of business, Petitioner had to, and did, make an economically motivated business decision to close the JFK terminal. The decision of its Board of Directors, announced on February 23, 1977, could no longer be avoided or vetoed because the Petitioner sustained huge losses and faced economic catas-

trophe.[4] The Petitioner then engaged Chimento Trucking, Inc. to perform, with the latter's personnel, like any other independent manpower company, certain clerical services for Petitioner (A. 60, 41, 190, 200, 225-226, 232, 270-271, 280).

On August 29, 1977, the Union filed charges of unfair labor practices based on the events of March 15, 1976, which had never been previously raised. The Administrative Law Judge (relying primarily and improperly on a settlement conference discussion (A. 27fn. 2) and the Board found that the Petitioner violated Section 8(a)(1) of the Act by threatening to close its facility at JFK Airport and violated Section 8(a)(3) and (1) of the Act by closing its JFK terminal and subcontracting the clerical work and by failing to reinstate four employees after they allegedly made unconditional applications to return to work.

The Court adopted and enforced the Board's order, in the main, but denied enforcement of "so much of the Board's order as relates to promises of benefits" (3a). The nub of the Court's decision was that substantial evidence supported the finding that the March 15, 1977 statement was made, that it was not based on any decision already

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[4] A memorandum from the President of Petitioner dated February 23, 1977 stated in relevant part: "Don, at the February 23, 1977 meeting of the Board of Directors, of C-F Air Freight, Inc., it was agreed that we will track on the operation of the JFK facility based on the operating plan submitted in late 1976. I have attached a copy of the schedule which was submitted to the Board with an agreement that it will be actual operating results. . . . I really took more heat about this than is indicated in Don's letter. We did buy some time however, and will continue to report to the Board on the attached schedule. However, I think we need to start formulating a study approach to determine how we can wind down in JFK in the event we are forced to." (A. 4-5, 388)

taken to close the facility down, and that it reflected a retaliatory intent. Although the Board based its conclusion on only one branch of the *Gissel* test, the Court added the second test, which was not supported by any evidence, namely that the March 15, 1977 statement was not protected as a "prediction . . . carefully phrased on the basis of objective fact", *NLRB* v. *Gissel Packing Co. Inc.,* 395 U. S. 575, 618 (1969). This conclusion is clearly controverted by the proofs.

The Court also failed to note that the second strike, which occurred on July 11, 1977, was not a lockout (A. 364-466), and was not an unfair labor practice strike. Moreover, the alleged subcontracting was not an occasion for a third strike or any other unfair labor practice strike. The shut-down of the JFK terminal was accomplished by the Union and not the Petitioner. The Board and the Court disregarded the evidence that the "subcontracting" occurred after the Union closed down the JFK terminal and the February 23, 1977 decision by Petitioner's Board of Directors to "wind down in JFK" (A. 4-5, 388).

A judgment by the Court enforcing the Board's order, with the modification previously stated, was apparently entered on October 15, 1980 (see * on p. 1 *infra*). A timely petition for rehearing, filed with the Court, was denied on October 7, 1980 (5a-6a).

Reasons for Granting the Writ

1. It is imperative that the issue raised in question one be answered because the Courts of Appeals are in conflict, if not in disarray, about the scope and ambit of this Court's decision in *NLRB* v. *Gissel Packing Co. Inc.,* 395 U. S. 575 (1969). The Board's views vary with its

changing composition and each new member reads into *Gissel* whatever his predilictions are. The consequence is that the industrial community and the labor law bar have no reliable guidelines.

2. The issues implicated by questions 2 and 3 can be resolved only by an explication by this Court of the circumstances when subcontracting is permissible and by a restatement of the substantial evidence rule.

A. Perhaps the clearest description of the conflict among the Circuit Courts was provided by the Court of Appeals for the Seventh Circuit in *Red Oaks Nursing Home, Inc.* v. *NLRB* [—— F.2d —— (10/22/80)—89 CCH LC ¶12,335]. There the union proved a card majority and the Board entered a bargaining order, which the Court rejected ruling:

> "Since the Supreme Court's decision in *Gissel,* the NLRB has been obligated to give reasons justifying the use of a bargaining order. In *Peerless of America, Inc.* v. *NLRB,* 484 F. 2d 1108 (7th Cir. 1973), this court explained the importance of the Board's obligation to give 'a detailed analysis' of the 'possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies' 484 F. 2d at 1118, as an aid to judicial review. In its brief here, the Board, citing *Gissel, supra,* admonishes us that "[t]he determination of when such a bargaining order is appropriate has been entrusted to the discretion of the Board, which " 'draws on a fund of knowledge and expertise all its own . . .' ". Ironically, even a "cursory examination of the decisions applying *Gissel, supra,* in this circuit and in other circuits reveals that the Board has declined re-

peatedly to assist the courts with this expertise by revealing reasons for issuing *Gissel* bargaining orders. See, *e. g., First Lakewood Associates* v. *NLRB,* 582 F. 2d 416 (7th Cir. 1978); *C & W Super Markets, Inc.* v. *NLRB,* 581 F. 2d 618 (7th Cir. 1978); *Walgreen Co.* v. *NLRB,* 509 F. 2d 1014 (7th Cir. 1974); *NLRB* v. *Gruber's Super Market, Inc.,* 501 F. 2d 697 (7th Cir. 1974); *Peerless of America, Inc.* v. *NLRB,* 484 F. 2d 1107 (7th Cir. 1973); *Self-Reliance Ukrainian American Cooperative Association* v. *NLRB,* 461 F. 2d 33 (7th Cir. 1972); *NLRB* v. *Henry Colder Co.,* 447 F. 2d 629 (7th Cir. 1971); *NLRB* v. *Drives, Inc.,* 440 F. 2d 354 (7th Cir. 1971); cert. denied, 404 U. S. 912; *NLRB* v. *Kostel Corp.,* 440 F. 2d 347 (7th Cir. 1971;) *NLRB* v. *Appletree Chevrolet, Inc.,* 608 F. 2d 988 (3d Cir. 1979); *Automated Business Systems* v. *NLRB,* 497 F. 2d 262 (6th Cir. 1974); *Daisey's Originals, Inc.* v. *NLRB,* 468 F. 2d 493 (5th Cir. 1972); *NLRB* v. *World Carpets of New York, Inc.,* 463 F. 2d (2d Cir. 1972)." (89 LC at pp. 25,735-25,736).

* * *

"By not stating separately why the circumstances of this case require a bargaining order, the Board appears in effect to be automatically issuing bargaining orders on the basis of virtually *any* unfair labor practice, a policy clearly not in accordance with *Gissel.* See *NLRB* v. *Appletree Chevrolet, Inc.,* 608 F. 2d 988, 998 (4th Cir. 1979)." (89 LC at p, 25, 736).

The identical lack of consistently reasoned analysis occurs in cases like the instant one, where orders are issued based on the Board's misreading of *Gissel,* compounded

by inventive, but incorrect, commentaries by the lower courts.

Illustrative, too, is an equally recent decision by the Court of Appeals for the Third Circuit (*United Dairy Farmers Cooperative* v. *NLRB*, [—— F. 2d —— (10/30/80) 89 CCH LC ¶12,350] where there was no card majority:

> "Our analysis of the authority of the Board to issue a bargaining order must begin with the Supreme Court's decision in *NLRB* v. *Gissel, supra.* Since *Gissel* is factually distinguishable from this case we must determine whether these factual differences are sufficiently significant to make the precepts announced in *Gissel* inapplicable to the instant case. An additional problem we must consider is whether in *Gissel* the Supreme Court was impliedly approving the rationale that the Board could issue a bargaining order in cases where the union neither won the election nor had a card majority." (90 LC p. 25,811).

After citing from this Court's discussion of a decision by the Fourth Circuit, the Third Circuit asks:

> "By the above discussion, was the Supreme Court advising lower courts of their views as to the Board's power to issue bargaining orders in exceptional cases 'without need of inquiring into majority status', or was the Court's decision an intellectual excursion not intended as a sign post giving directions which lower courts should follow in the future? Although several commentators did not specifically endorse the issuance of bargaining orders in the absence of a card majority,[11] virtually every court that has discussed the issue has stated that a bargaining order may be issued in the absence of a card majority." (89 LC at p. 25,811).

The confusion articulated by the Third Circuit is shared by the commentators identified in footnote 11 to its opinion: (Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority,* 29 Lab. L. J. 631 (1978); Comment, *Bargaining Orders since Gissel Packing: Time to Blow the Whistle on Gissel?* 1972 Wis. L. R. 1170; Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards,* 4 Ga. L. Rev. 779 (1970).)

We note, too, that another log was added to the fire of debate by the Second Circuit in *NLRB* v. *Jamaica Towing, Inc.,* [—— F.2d —— (10/1/80) 105 LRRM 2959] when it declined to enforce a bargaining order notwithstanding a card majority. This Court, too, embarked on an "intellectual excursion"!

Although the case at bar does not involve a bargaining order, the Board's order and the Court's affirmance draws its substance from what each reads into *Gissel.*

The facts in this case showed that a plan to close down the JFK terminal long preceded any union activity or knowledge by the Petitioner that the employees had any interest in union organization. This fact was conceded by the Board but it concluded that the March 15, 1977 statements by Condon constituted an unlawful threat rather than a prediction. (A. 12).[5] But this "threat" was not alleged in charges filed by the Union on July 5, 1978. That the statement was based on objective fact, namely the experience of the Petitioner, is admitted by a finding by the

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[5] Condon's prediction was "carefully phrased on the basis of objective fact" Gissell at p. 618 and although the Board acknowledged the uncontradicted evidence of losses suffered by Petitioner, it commanded that additional losses be incurred by continuing its operations in Metropolitan New York with the employees who were part of the Union's warfare.

Board that "It is reasonable to presume unionization of employees at the JFK facility was viewed by the respondent's management as an impediment to their efforts to reverse the financial losses. The record reflects that the Petitioner dealt with unions at other of its terminals. Thus, the Respondent had experienced the additional cost of potential of unionization". (A. 7). Further, the Board acknowledged that the words were lawful predictions or, at least, ambiguous when viewed in isolation. Nevertheless, it found there was a violation even "though this issue is not free from doubt". (A. 13), because it found that Petitioner had made unlawful promises. But the Court found no violation committed by the so-called promises (App. A, 3a).

Thus, the Court reached two inconsistent conclusions: it found that in one speech, which cannot be fragmented, Condon unlawfully threatened to close petitioner's JFK facility but made no unlawful promises. To be sure, a single speech may include both permissible and impermissible statements, but in this instance, the permitted promise was a "common sense assessment of the consequences" if the financial condition of the JFK terminal was not improved and a valid prediction of a plant closing.

Assuming, *arguendo,* that the threat was made as reported, it was protected unless the decision in *Gissel* that:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of the specific views about a particular union, so long as the communications do not contain 'threat of reprisal or force or promise of benefit'. He may even make a prediction as to the precise effects he believes unionization will have on his

> company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control, or to convey a management decision already arrived at to close the plant in case of unionization." (p. 618)

has a meaning which, as in Alice in Wonderland, each Court may take it to mean what it elects it to mean so that a failing enterprise may be compelled to continue its operations until bankruptcy overtakes it. But in the reasonable context of *Gissel,* the statement attributed to Condon was a reasoned prediction based on objective facts. Nevertheless, the Board and the Court proceeded to add their own gloss to *Gissel* and to rewrite it as a new rule, namely that once having made a threat of a plant closure, the offense can never be purged and an employer must continue to operate a failing enterprise even though the threat did not discourage union organization and the closure was compelled by economic circumstances aggravated by repeated strikes and work stoppages.

The Court also disregarded the fact that although the threat of plant closure was allegedly made on March 15, 1977, no charge was filed until August 29, 1977, and then only after the initial charge was dismissed. When the July 11, 1977 charge was filed, the charging party, Ryby, who invited the Union, either never advised the Board's agent about the alleged threat to close down the JFK terminal or if he did, the Regional Director decided that Petitioner had not violated the Act when he refused to issue a complaint. (A. 364-365).

Clearly, the so-called promises did not discourage the employees from organizing but it was on the basis of the

factitious finding of an unlawful promise that the Board ordered the Petitioner to re-establish its operations in the Metropolitan New York area. The Court, however, found that the promises were not proscribed by the Act.

The contrariety of views by the Board and the Courts will plague the Board, Courts, employers, unions and lawers, until this Court provides a clarifying lesson.

B. After it decided to close its JFK facility, the Petitioner engaged an independent company to provide clerical services. This was found to evidence anti-union animus, but the facts of record rebut this inference. The law is clear that absent a discriminatory motive, an employer may partially close his business. [*Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 268-269 (1965)]. It is equally clear that an employer does not violate the Act if his decision to subcontract is bottomed on, and supported by, sound business reasons. (*NLRB* v. *Rapid Bindery, Inc.*, 293 F. 2d 170 (2d Cir. 1961)).

The Board and the Court arbitrarily rejected the evidence that the Petitioner's decision to subcontract the clerical work performed at the JFK facility was motivated solely by economic concerns. Indeed, the decision to shutdown and to subcontract was not one capriciously arrived at by Petitioner. On the contrary, it was dictated by massive financial losses and by the continuing unlawful strikes by unions who acknowledged their unlawful activities by a settlement order and a formal Board Decision and Order.

The record also showed that Petitioner had a pattern of subcontracting part or all of its operations in various cities long before the Petitioner's employees spoke about a union. The Board and the Court ruled, however, that the

disruptive strikes and violence, and the consequent loss of business did not justify the decision to shut down the JFK facility and subcontract a part of the work formerly performed there. This case, therefore, calls for a reanalysis of an employer's right to subcontract in the face of unlawful strikes and picketing. This is not a case where a previously made threat of plant closure occasioned a strike. On the contrary, the record shows that a charge, filed on July 11, 1977 (long after the March 15, 1977 meeting, when the alleged threats were made) of an unlawful lockout and refusal to rehire alleged discriminatees (A. 366) was rejected by the Regional Director of the Board when he determined that the Petitioner had not "violated the Act in any manner encompassed by your charge". (A. 364).

C. No principle in labor cases has been beset with so irreconciliable a congery of conceptions than "substantial evidence" which appeared to be so plainly described and defined in *Universal Camera Corp.* v. *NLRB, supra.* A citation of conflicting decisions would exceed the permissible limit of this petition. What has occurred is that the Board issues "magic words" and litany sprinkled with caveats which the Courts rubber stamp. (*NLRB* v. *Appletree Chevrolet, Inc.*, 608 F. 2d 988, 998 (4th Cir. 1979)). Various Courts of Appeal and, in this case, the Second Circuit, have disregarded this Court's teaching that although Congress invests the Board with wide discretion, the reviewing Courts ought not rubber stamp decisions where "the Board's analysis ignored the realities of the situation. . ." (*NLRB* v. *Savair Mfg. Co.*, 414 U. S. 270, 276-277 (1973)).

The criteria have become diaphanous—every Court sees through the errors of another (*NLRB* v. *Interboro Contractors, Inc.*, 388 F. 2d 495, (1967); *NLRB* v. *Northern Metal Co.*, 440 F. 2d 881 (5th Cir. 1971); *NLRB* v. *Bud-*

dies Supermarkets, Inc., 481 F. 2d 714 (5th Cir. 1973); *ARO, Inc.* v. *NLRB*, 596 F. 2d 713 (6th Cir. 1979) and, most recently by the District of Columbia Circuit, *Kohls* v. *NLRB*, 89 LC ¶12,209 (7/18/80)).

In *Universal Camera Corp.* v. *NLRB, supra,* this Court did delineate the scope of review by the Court of Appeals, and it did not intend to elevate a cryptic and inadequate review of evidence by the Administrative Law Judge or an administrative agency to a model of jurisprudence. In adopting the Board's findings, the Court gave "more weight than in reason and in the light of judicial experience they deserve." (Id. at 496).

As for "substantial evidence, which the Court accepted, we point out that after discussing the history of Petitioner's horrendous losses, the Board said: "I perceive the unquestioned poor financial situation of the Petitioner to have been no serious [sic] factor in the decision to close . . . JFK . . ." (A.12). This arcane finding was held by the Court of Appeals to constitute substantial evidence.

It is respectfully submitted that this case presents the occasion for clarification of three critical principles of labor and administration law and to establish a reliable norm of permissible conduct under the National Labor Relations Act.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statement in Lieu of Formal Opinion of the United States Court of Appeals for the Second Circuit*

(Filed—September 17, 1980)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty.

Present:

Honorable Wilfred Feinberg, Chief Judge

Honorable Henry J. Friendly, Honorable James L. Oakes, Circuit Judges

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

C-F AIR FREIGHT, INC.,

Respondent.

---

* N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix A

This cause came on to be heard on the application of the National Labor Relations Board for enforcement of its Decision and Order dated January 18, 1980, and was briefed and argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the order of the Board be and it hereby is enforced, except as to so much of the order as relates to promises of benefits.

The National Labor Relations Board petitions for enforcement of an order requiring respondent C-F Air Freight, Inc., among other things, to cease and desist from threatening to close any of its facilities because its employees engage in union activities and from promising the employees economic benefits to dissuade them from such activities; to offer reinstatement and compensatory relief to four employees dismissed as the result of unlawful discrimination based on their participation in an organizational strike; and to resume clerical operations formerly performed at its facility at John F. Kennedy International Airport but now subcontracted out to another company. The Board's order adopted in most respects the findings and the recommended order of the administrative law judge.

The Board found that respondent's manager at the JFK facility threatened its clerical employees within the meaning of § 158(a)(1), by telling them that if they succeeded in efforts to bring in a union the company's executive office would close the facility down. Substantial evidence supports the finding that such a statement was in fact made, that it was not based on any decision already taken to close the facility down, and that it reflected a retaliatory intent. It was thus not protected as a "prediction

. . . carefully phrased on the basis of objective fact," NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

The Board also found that the manager had made an unlawful promise of economic benefits, again in violation of § 8(a)(1), in telling the employees that they should give him time to improve the terminal's financial condition—it had been losing substantial sums of money for several years—and saying that if he was successful in improving the facility's financial situation the employees too would be successful, "because . . . increased sales . . . means the jobs would grow, there would be additional jobs, there would be promotions within the terminal." We do not find sufficient evidence in the record to sustain the Board's finding that this was an improper promise. The manager gave no indication that he would give the employees a better deal on wages or employment conditions if they deserted the union; he was simply presenting a commonsense assessment of the consequences of a financial upturn at the facility, not prohibited by *Gissel Packing*. Accordingly, we deny enforcement of so much of the Board's order as relates to promises of benefits.

With respect to the remedy ordered, we find that the Board did not abuse its discretion in ordering respondent to resume the clerical operations formerly conducted at the JFK facility. Substantial evidence shows that respondent shut down its JFK operations and subcontracted the work for retaliatory and discriminatory purposes, in violation of §§ 8(a)(3) and (1) of the Act. The resumption order was an appropriate remedy under the circumstances. Contrary to respondent's assertions, the order does not require resumption of operations at JFK itself; respondent is free under the order to resume operations at "some other reasonable location within the New York metropoli-

tan area." Since it is clear that respondent continues to need and use the services of several clerical employees under its subcontract, we do not find this order to be unfair or unduly burdensome. See UFI Razor Blades v. District 65, 610 F.2d 1018, 1022 (2d Cir. 1979).

Finally, we see no abuse of discretion in the order insofar as it calls for an offer of reinstatement and compensation to the four employees unlawfully discriminated against by respondent. Accordingly, with the exception noted, we enforce the order of the Board.

WILFRED FEINBERG
Wilfred Feinberg, Chief Judge

HENRY J. FRIENDLY
Henry J. Friendly

JAMES L. OAKES
James L. Oakes, Circuit Judges

APPENDIX B

Order of the Court of Appeals Denying Petition for Rehearing

(Filed—October 7, 1980)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 80-4050

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of October, one thousand nine hundred and eighty.

Present:

HON. WILFRED FEINBERG,
Chief Judge,
HON. JAMES L. OAKES,
HON. HENRY J. FRIENDLY,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

C-F AIR FREIGHT, INC.,

Respondent.

Appendix B

A petition for a rehearing having been filed herein by counsel for the respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk
by A. HELLER
Deputy Clerk

APPENDIX C

Statute Involved

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least

a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

No. 80-1127

In the Supreme Court of the United States

OCTOBER TERM, 1980

C-F AIR FREIGHT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(1) of the National Labor Relations Act, by threatening to close its facility if its employees engaged in union activity, and Section 8(a)(3) and (1) of the Act, by closing the facility and subcontracting the work formerly performed there to prevent the unionization of its employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The decision and order of the National Labor Relations Board (A. 1-29)[1] is reported at 247 N.L.R.B. No. 60.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1980, and a petition for rehearing was denied on October 7, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on January 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 7a-8a).

STATEMENT

1. The Board found that petitioner, an air freight forwarder, violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily closing its John F. Kennedy Airport (JFK) terminal and subcontracting the clerical work formerly performed at that location, and by failing to reinstate four clerical strikers after they had made unconditional offers to return to work following a strike (A. 18). The Board further found that petitioner violated Section 8(a)(1) of the Act by threatening employees with the closure of the terminal if they chose union representation (A. 12), and by promising

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[1]The petitioner has filed with this Court the original record submitted to the court of appeals. "A." references are to the pages of the printed court of appeals appendix, which contains the Board's decision and order and designated portions of the original transcript and exhibits presented at the unfair labor practice hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "S.A." references are to the Supplemental Appendix contained in the Board's reply brief in the court of appeals.

employees increased benefits to dissuade them from supporting a union (A. 13). The Board ordered petitioner, among other things, to offer the four clerical employees reinstatement with back pay and to resume the clerical operations formerly performed at the JFK terminal at the former location or some other reasonable location within the metropolitan New York area (A. 18-29).

The JFK terminal had lost money since 1970, but had begun to reduce its losses in early 1977 (A. 3; 92, 116). In September 1976, petitioner's Eastern Area Manager, Donald G. Berger, informed JFK Terminal Manager Edward Ryby that although there were rumors that the JFK terminal might be closed because of lack of profits, as far as he was concerned "we were going to stay in New York and make a go of it" (A. 3-4; 312). Meanwhile, the Company "drew up a plan * * * to improve matters at JFK" (A. 3-5; 290, 267-268). The plan included the hiring of a new division manager, David Condon, whose mandate was to "concentrate on building up the sale[s] in New York," and a new sales manager and sales personnel (A. 4; 114-115, 313-314). In February 1977, petitioner's Board of Directors agreed to continue the JFK terminal based on the 1976 plan (A. 4-5; 388), and Berger informed Ryby that the terminal would continue to operate (A. 4; 313-314).

In early March 1977, several of the clerical employees met with Condon concerning a rumor that one of them was to be laid off (A. 5). In response to the declaration of one employee that there was no job security at the terminal and that the employees "needed a union there to be secure," Condon remarked that if the employees "brought a union into the office * * * the main offices in San Mateo wouldn't stand for it and they would close the doors" (A. 6; 141-142, 62, 151-152, 159-161).

Shortly thereafter, Condon was advised that morale was low at the JFK terminal and that its employees were considering

an organizational campaign (A. 6). On March 15, 1977, Condon held a meeting with the employees, at which he told them that he knew they were seeking information about unions. He assured the employees that "he was trying to make a go of it at JFK," that their jobs were safe, and that he planned to improve the terminal's financial status (A. 7; 64, 97, 119, 142-143, 156, 167, 211-212, 329). Condon then advised the employees that there "was no need for a union" and that the Company would close the terminal if a union came in (A. 7; 156, 64, 98, 119, 143, 166). Shortly thereafter, Berger advised Ryby to inform the employees "if they join a union [that he will] padlock the door" (A. 8; 66).

In early June 1977, the employees met with the president of Local 851, International Brotherhood of Teamsters, and signed authorization cards. They decided to request recognition from petitioner and to strike "to make them realize that they meant it" (A. 9; 36-37, 52-53). On June 13, the six clerical employees began their strike and picketed the JFK terminal. Petitioner refused the Union's request for recognition (A. 10) and continued to operate the JFK terminal during the picketing (A. 10; 189-190, 215).

On July 10, 1977, the clerical employees unconditionally offered to return to work, but they were not permitted to enter the terminal (A. 9). Condon later advised them that it would take "some time to reinstitute normal operations at the JFK facility" (A. 9; 353). A few days later, petitioner recalled two of the clerical employees (A. 9; 354). These employees returned to the picket line two weeks later. Petitioner did not recall any other clerical employee to work, although some of them repeatedly contacted the Company about returning. (A. 9-10.) The strike ended shortly before Labor Day. During this time, petitioner continued to work on inbound deliveries at its JFK terminal. (A. 10; 40, 184-187, 190, 335-337.) In early September, petitioner closed its JFK terminal and entered into a subcontract arrangement

with an independent trucking service to perform, at a facility located in Brooklyn, New York, the clerical functions previously performed by the non-recalled clerical employees at the JFK terminal (A. 10).

2. In finding that the closing of the terminal was discriminatorily motivated, the Administrative Law Judge, whose decision was adopted by the Board, rejected petitioner's contentions that the closing of its JFK terminal was based solely upon economic conditions and that it had decided to close the terminal in February, "before any hint of union activity among the employees" (A. 13-18). The ALJ found that the documentary evidence, as well as the assurances given to the employees in mid-March, did not support the contention that the decision to terminate was made in February (A. 15). The ALJ also relied upon petitioner's threats to close the terminal in the event that the employees chose to unionize (*ibid.*). Finally, the ALJ noted that although the JFK terminal was not profitable, the Brooklyn operation, which utilized the same number of employees and substantially the same managerial and sales force, "has not prevented [petitioner] from suffering financial loss attributable to the subcontracted work" (A. 18).

The ALJ further found that petitioner's statements to the employees about plant closure transgressed the Court's admonition in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), that predictions as to the consequences of unionization on a company must either be based on facts showing demonstrably probable consequences beyond the employer's control or convey a management decision already arrived at (A. 11). The ALJ found that petitioner had not already decided to close the terminal and that the prediction of dire consequences was not based on objective fact because petitioner's poor financial condition had nothing to do with the decision to close the terminal (A. 12).

3. The court of appeals (Pet. App. 3a) upheld the Board's decision and enforced its order, except for the finding that petitioner had unlawfully promised benefits to its employees.[2] The court found that (Pet. App. 2a-3a):

> Substantial evidence supports the finding that such a statement [concerning plant closure] was in fact made, that it was not based on any decision already taken to close the facility down, and that it reflected a retaliatory intent. It was thus not protected as a "prediction . . . carefully phrased on the basis of objective fact," *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The court also found (Pet. App. 3a) that "[s]ubstantial evidence shows that [petitioner] shut down its JFK operations and subcontracted the work for retaliatory and discriminatory purposes, in violation of §§ 8(a)(3) and (1) of the Act."

ARGUMENT

Petitioner asserts (Pet. 8-12) that certiorari should be granted here to resolve a conflict among the circuits concerning the scope of this Court's decision in *Gissel, supra*. The cases and authorities upon which petitioner attempts to rely all relate to that aspect of the *Gissel* opinion dealing with bargaining orders based on authorization cards. By contrast, there is no bargaining order here. The issue presented here is simply whether substantial evidence supports the Board's finding, upheld by the court of appeals, that petitioner's statements concerning the terminal's closure were threats of retaliation, rather than predictions based on

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[2]That aspect of the court's decision is not at issue here.

objective fact. That is a factual issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[3]

In any event, as we have shown (pages 2-4, *supra*), the Board's findings are amply supported by the record. Thus, the record shows that Condon, in early March 1977, threatened two employees with the terminal's closure if a union were brought in, and that he repeated the threat to the entire staff on March 15. Condon's threats occurred at the same time that petitioner was attempting to insure continuance of the terminal's operation and assuring the employees that their jobs were not in jeopardy.[4]

Similarly, petitioner's assertion (Pet. 15-16) that the Board and the court of appeals erred in rejecting its contention that it subcontracted the clerical work at the JFK terminal for economic reasons raises only a factual issue that does not warrant review by this Court. Moreover, as we have shown (pages 3-4, *supra*), here too the Board's findings are amply supported by the record. Thus, the record shows that petitioner planned to keep the terminal open for all of 1977, and that it attempted to do so until its employees sought to unionize. At that point, it opened a similar operation in Brooklyn, with the same sales force, but with a subcontracted clerical force, that continued to lose money.[5]

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[3]Petitioner's assertion (Pet. 16-17) that the court of appeals misapplied the *Universal Camera* standard of review amounts only to a contention that the court should have rejected the Board's evidentiary finding.

[4]Petitioner's assertion (Pet. 13) that the Board "acknowledged" that the issue was " 'not free from doubt' " is erroneous. The part of the Board's decision which petitioner quotes (A. 13) dealt with the finding of an unlawful promise of benefit, not with petitioner's threats to close the terminal.

[5]Petitioner's assertion (Pet. 15) that the decision to close was due to the continuing strike is belied by the fact that it refused to reinstate four

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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of the strikers when they attempted to return to work in July, two months before the strike ended (pages 3-4, *supra*), and the fact that the strike did not cause any interruption in business. The evidence of alleged union misconduct (S.A. 1-39), to which petitioner refers (Pet. 4-7, 15), occurred on one day at the beginning of the strike in mid-June, a month before the Company sent telegrams informing the clerical employees that it was attempting to resume operations, and two months before the terminal closed. There was no evidence presented at the hearing that the alleged misconduct continued after mid-June. Moreover, although the Union entered an informal settlement agreement because "the parties to this Settlement Agreement desire to settle and adjust these matters amicably and without further proceedings herein" (S.A. 34), the Company offered no evidence to show, as the Board noted (A. 20 n.12), that any of the discriminatees had engaged in specific misconduct.